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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN DARRELL BIRD,

Defendant and Appellant.

2d Crim. No. B166997  
(Super. Ct. No. 2002030379)  
(Ventura County)

A jury convicted Steven Darrell Bird of one count of second degree robbery. (Pen. Code, § 211.)<sup>1</sup> Bird admitted 11 prior robbery convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12.), three of which are serious felonies within the meaning of section 667, subdivision (a)(1). The trial court sentenced Bird to a total of 40 years to life.

On appeal, Bird contends the trial court abused its discretion in refusing to strike his prior convictions, and that his sentence constitutes cruel and unusual punishment. We affirm.

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<sup>1</sup> All statutory references are to the Penal Code.

## FACTS

At 8:30 p.m., on September 5, 2002, Bird walked into a gas station, put his hand in his pocket pretending to have a gun and demanded money from the cashier. When the cashier pretended not to understand, Bird took his hand out of his pocket and reached into the cash register. He grabbed about \$70 worth of rolled quarters.

The cashier, realizing Bird did not have a gun, pushed him down and kicked him. Bird struggled with another gas station employee inside the station and out into the street. At last Bird threw the coins at the employee and walked away. He was arrested by the police shortly thereafter.

### *Defense Case at Sentencing*

In 1968, when Bird was only four years old, his uncle Charles Wood began physically and sexually abusing him. The abuse included beatings, rapes and long periods locked in a closet. Wood forced Bird to take alcohol and drugs. Eventually, Wood was arrested and convicted of molesting Bird, but was given a suspended sentence. In 1986, Wood was convicted of molesting another boy and was sentenced to 18 years in prison.

The experience left Bird addicted to alcohol and drugs. When he was 12 years old, he tried to kill himself. He was sent to juvenile hall where a counselor molested him. He had several juvenile adjudications for petty theft and burglary.

Bird was first convicted as an adult when he was 18. He has spent most of his adult life in prison. In spite of his incarceration, he continued to abuse alcohol and drugs. Bird suffers from bipolar disorder.

Prior to his most recent parole, Bird decided to change his life. He gave up alcohol and drugs and became a Christian. He requested parole to Washington State, where his brother promised him a job, or to Bakersfield, where he had other relatives.

Instead, Bird was paroled to Ventura County. His former girlfriend, Ruth Lopez, lived in Oxnard with their 10-year-old son. Bird wanted to see his son, but he did not want to live with Lopez because she was still a drug addict. He told his parole

officer, Don Brubaker, about his concerns but Brubaker made no alternative arrangements.

Bird lived with Lopez for about a week. He told Brubaker he had to leave because she smoked marijuana in the house and kept a sawed-off shotgun there. He stayed in motels until his money ran out. After that, he slept on the beach.

Brubaker admitted that Bird had no resources in Ventura County. He testified that Bird missed no appointments with his parole officer and always tested clean for drugs and alcohol. Brubaker admitted he did not help Bird find a job.

Bird said he robbed the service station so that the police would arrive and kill him.

*Trial Court's Statement at Sentencing*

"[Bird has] been abused by a government that closed the mental hospitals so that he could not in any way get any of those benefits. He's been abused by a government that provided him with a parole that was, in my view, entirely unsatisfactory.

". . . And then to listen to his parole officer sit up here -- and I will tell you quite candidly, I don't mean to insult the man, but I found him less than entirely credible. And he provided him with nothing. [¶] . . . [¶]

"Now having said all that, the thing that sticks out about this particular case and this particular defendant and the motion and the sentence he has suffered tragically as a victim of all of it. And I agree with you [defense counsel], that he has done remarkable things with his life, based on the evidence I heard, in the last few years.

"Here's the problem: The problem is that I believe that without a support system in place, he cannot survive on the streets. And I have no evidence, zero evidence, of a support system, zero, whether now or ten years from now. He has no friends. He has no church. He has no family that can effectively support him. Well-intentioned as they may be, they didn't this last time. There is nothing to indicate they can do it again.

"So whether I were to release him right now into the streets, I don't think he could make it because nothing will have changed. And as you told the jury, he goes with

what works, and what worked the last time was the 211. So that's what he did this time, because that's what works. [¶]

"Mr. Bird has no support system on the outside. And you cannot demonstrate to me and I -- you can't because it's simply not possible if you were to demonstrate to me that ten years from now, he will have a better parole officer, a family, a church group, a better understanding.

"So it becomes an exercise in utter futility. That is to say, you're asking me to strike 11 priors, or maybe it's nine. It's an incredible number of priors that you're asking me to strike. And I will tell you that if I had a family in here during this proceeding, if I had a wife, a mother, a father, a -- brothers and sisters, all of them sitting in here, ten people, 12 people sitting there saying credibly, 'If he's out, he can live with me. I will provide him with food, with money. I will provide him with everything he needs. I'm there for him 24 hours a day,' as they like to say today, '24/7' or '7/24' or whatever the number is that they use. I'd give it some serious thought.

"You can't do it. It doesn't exist. And if it doesn't exist, we have a disturbed man -- I mean, he's certainly justified in being disturbed. But the reality is, he is. And we're going to put him back out on the streets where he will be stressed by who knows what, we'll get a catch-as-catch-can support system, if there's any, and be right back where we started from, except maybe he'll be older and maybe he can't really do a 211 by the time he gets out, and so maybe he'll do something equally bad or I don't know what, to get himself a bed, to get a meal, to get shelter, because that's all he knows. And I don't mean that negatively. I mean that as a reality. [¶] . . . [¶]

"But for me to justify the extraordinary remedy of kicking nine or more strikes, which I would be willing actually to do if I felt there was a significant and valid support system, that's the record I'd have to make. I'd have to make the record -- to be intellectually honest with myself, I'd have to say to the appellate court, 'Let me tell you why I'm doing this. Let me tell you why I'm kicking nine strikes, probably an unprecedented act, because I am convinced by -- based on the support system that I've seen that all of his family that I believe have the ability to support him, will provide him

with shelter, with money, with employment, with the necessary mental health professional if he needs it. That's why I'm doing it.' I have none of that. "

## DISCUSSION

### I

Bird contends the trial court abused its discretion in denying his motion to strike 11 prior convictions.

The trial court has the power to strike prior convictions in the interest of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) In determining whether to strike prior convictions under the three strikes law, the trial court must consider whether in light of the nature and circumstances of his present and prior convictions, and the particulars of his character, background and prospects, the defendant may be deemed outside the scheme's spirit. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . ." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.)

Bird argues the trial court stated a willingness to release him if he had a support system, but the court ignored evidence that he has support. The evidence Bird cites are letters from his mother, brother, his pastor and members of his prayer group.

But none of the letters offered the 24-hours-a-day, 7-days-a-week support the trial court found was necessary. At best, Bird's mother made a general request that Bird be released to her custody and his brother offered to sell his art on consignment in his antique store. The court was not required to find such general offers of support were adequate for a person with Bird's mental problems. The court also noted that his relatives were unable to provide adequate support this time and there is no reason to believe they would in the future.

The record shows the trial court carefully considered all the circumstances. The deputy district attorney stated with some eloquence that despite his sympathy for Bird's circumstances, public safety would not be served by striking Bird's priors. The court also expressed a great deal of sympathy for Bird. In spite of that sympathy,

however, the court determined not to strike the prior convictions out of fear Bird would reoffend. Bird has failed to carry his burden of showing the decision was irrational or arbitrary.

Bird points to the trial court's statement that no appellate court would sustain its decision should he grant the motion. He argues the statement shows the court abdicated its duty to apply its own discretion. But the statement only shows the trial court recognized that the application of its discretion is not boundless.

## II

Bird contends his sentence constitutes cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

A sentence constitutes cruel and unusual punishment if it is so disproportionate to the offense for which it is imposed that it " . . . shocks the conscience and offends fundamental notions of human dignity." (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) As an aid in determining whether a sentence constitutes cruel and unusual punishment, we engage in a three-part analysis. First, we examine the nature of the offense and the offender, paying particular attention to the danger each poses to society. Second, we compare the punishment with punishment for more serious crimes in the same jurisdiction. Third, we compare the punishment with the punishment imposed for the same offense in other jurisdictions. (*People v. Almodovar* (1987) 190 Cal.App.3d 732, 739-740, citing *In re Lynch* (1972) 8 Cal.3d 410, 425-427.)

Here Bird focuses exclusively on the nature of the offender. Bird claims he did not fail to learn from previous incarcerations. Instead, he tried to turn his life around, but the parole system failed him by providing no services from which he could benefit. Given that the state played such a contributing role in his final offense, he argues it would be cruel and unusual for the state to subject him to life in prison.

No doubt, the sincere desire to reform and the state's failure to provide services may be factors the court can consider in granting leniency in sentencing. But Bird cites no authority that those factors constitutionally compel a lesser sentence. In examining the nature of the offender, the trial court is not required to ignore 11 prior

convictions and its assessment of the likelihood the defendant will reoffend if released.  
Bird's sentence is not cruel and unusual.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Allan L. Steele, Judge  
Superior Court County of Ventura

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